No. 93-57

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KARL EASTON, M.D.,

Petitioner,

—v.—

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, and NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Karl Easton ("Easton" or "petitioner") seeks review of the decision and order of the Supreme Court of the State of New York, Appellate Division, Second Department dated July 6, 1992, which granted a $7.5 million judgment against him for Medicaid fraud.[1] The Appellate Division denied leave to appeal to the New York Court of Appeals on September 10, 1992, Petition ("Pet.") 5a, and the Court of Appeals denied leave to

[1] The decision below is reproduced in an appendix to this brief ("A.") because the copy that appears in Appendix D to the petition contains several major gaps in the narrative.

appeal on January 7, 1993, Pet. 3a. On April 8, 1993, the Court of Appeals denied petitioner's motion for reconsideration of the denial of leave to appeal. Pet. 1a.

Petitioner now seeks certiorari review, claiming for the first time that the judgment below violated his rights under the Fourteenth Amendment to the United States Constitution. He argues, first, that the State respondents should be "judicially estopped" from obtaining the judgment against him because of alleged inconsistencies between the State's arguments in this case and in a related federal civil rights action brought by petitioner, *Easton v. Sundram et al*, 947 F.2d 1011 (2d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1943 (1992). Petitioner claims that this supposed inconsistency rises to the level of a federal due process violation. Second, petitioner claims that the judgment violated his due process rights because of an alleged absence of any evidence to support the unanimous finding of the court below that he designed and implemented the fraudulent Medicaid billing scheme.

The petition should be denied. As a preliminary matter, this Court lacks jurisdiction over the constitutional claims because petitioner failed to raise either of them in the court below, as required by 28 U.S.C. § 1257(a). Furthermore, even if jurisdiction were proper, petitioner's claims are based on significant mischaracterizations of the records in the court below and in the federal action. The State took factually identical positions in the two lawsuits and produced abundant evidence to support the unanimous findings of Medicaid fraud and of petitioner's personal role in the scheme. Finally, even if petitioner had raised these constitutional claims below and had accurately described the facts, he fails to raise a constitutional question worthy of this Court's attention.

STATEMENT OF THE CASE

The State Court Case

The State brought this action in 1986 alleging that petitioner utilized his role as founder, Medical Director and controlling

voice in Brooklyn Psychosocial Rehabilitation Institute ("BPRI"), a licensed mental health program, to perpetrate a massive scheme to defraud Medicaid by billing for non-existent or non-reimbursable services. The State further alleged that petitioner personally benefited from the fraud by using his role on the BPRI board of directors to arrange exorbitant, non-arm's length leases between BPRI and petitioner's family-owned realty corporations, Cobble Hill Center Corporation and 3 Lafayette Avenue Corporation, which petitioner also controlled.

The State's complaint was dismissed following trial before Judicial Hearing Officer ("JHO") Carmine A. Ventiera, Pet. 19a-70a, and the State sought an expedited appeal. In its briefs to the Appellate Division, the State reviewed the detailed evidence in the record of the illegal Medicaid billings and the fact that Easton, through his role as Medical Director of BPRI and his control over the BPRI board of directors, personally

> designed, supervised and implemented the Medicaid fraud *on behalf of BPRI* (and, ultimately, himself, through funds paid by BPRI to his family.)

Brief for Plaintiffs-Appellants to the Appellate Division, Second Department, December 16, 1991, ("Pl-App. Br.") at 65. (emphasis supplied).

The State did not argue, as petitioner claims, that Easton was liable for the Medicaid fraud *because* he and BPRI were the same entity or each others' "alter-egos", or because "the actions of one must be attributed to the other." Pet. 2, 12. Rather, the State claimed that it was Easton's dominant influence over the operations of BPRI that enabled him to play a critical role in designing the Medicaid fraud, and that it was *he*, not the BPRI board of directors or staff, that orchestrated that illegal billing scheme.

Relying on extensive documentary and testimonial evidence presented at trial, respondents proved that Easton initiated the idea of subsidizing BPRI through fraudulent "home visit" Medicaid billings, permitted use of his personal medical license

number on the fraudulent bills, supervised the design of the forms used for the fraud, instructed staff on the implementation of the scheme, prodded staff to keep up the phony billing, and advised a State official that he needed the "home visit" money to fund BPRI. *See* Plaintiffs-Appellants' Appendix filed in the Appellate Division, Second Department ("App."), 578-580, 601-620, 632-639, 658, 680-81, 701, 708-09, 734, 884, 913. Based on this evidence, the State sought a judgment against Easton under New York Social Services Law ("SSL") § 145-b, which imposes liability on any individual who falsely obtains public funds "on behalf of himself or others."[2]

The Appellate Division, Second Department unanimously reversed the dismissal of the complaint and granted judgment to the State on the record, finding that the State plaintiffs had

> carried by *overwhelming evidence* their burden of proving that the defendants fraudulently billed Medicaid for "home visits" that were not actually performed, as the patient-staff interactions reported as BPRI "home visits" did not satisfy the Medicaid regulations and guidelines.

A. 3a. (emphasis supplied). The court found that between January, 1985 and October, 1986, through this fraudulent scheme, BPRI had received $ 2,524,501 in public funds to which it was not entitled.[3] Although the payments were made to BPRI, the licensed Medicaid provider, the court ruled that it was

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[2] The relevant portion of SSL § 145-b states as follows:

> It shall be unlawful for any person, firm or corporation knowingly by means of a false statement or representation, or by deliberate concealment of any material fact, or other fraudulent scheme or device, ***on behalf of himself or others***, to attempt to obtain or to obtain payment from public funds for services or supplies furnished or purportedly furnished pursuant to this chapter. (emphasis supplied).

[3] Contrary to petitioner's statement, Pet. 18, respondents proved the amount of money fraudulently obtained through submission into evidence of computerized print-outs of payments for which, as the court below found, BPRI's records contained no documentation of reimbursable services.

clear from the trial testimony that Easton designed, supervised, and implemented BPRI's "home visit" billing fraud on Medicaid.

A. 6a.

The court further found that the Medicaid fraud "inured to the benefit of Easton and his family," who were personally enriched through BPRI's payment of "grossly inflated rents" to realty corporations "ostensibly owned" by petitioner's children, but under his "*de facto* control." A. 6a. These leases, the court ruled, were *"per se not negotiated at 'arms length' "* because petitioner sat on "both sides of the bargaining table, in his not-for-profit capacity as Medical Director of BPRI and his for-profit role as ultimate owner" of the realty corporations. A. 6a.

The Appellate Division accordingly ordered judgment against Easton pursuant to SSL § 145-b, including the treble damages mandated therein, based on his direct role in the fraud.

The Federal Lawsuit

While the Medicaid fraud case was proceeding through the State courts, Easton commenced a multi-claim federal action in the United States District Court for the Southern District of New York against ten former and current State officials, some of whom were employed by the respondents in this case.[4] Petitioner alleged, *inter alia*, that the defendants had pursued him for Medicaid fraud in retaliation for BPRI's earlier success in a State Article 78 proceeding, which challenged a State administrative decision barring patient referrals to BPRI due to its sub-standard conditions. Easton alleged that the defendants

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[4] Petitioner sued the defendants in their individual as well as official capacities and did not name any of the respondents in this case in the federal action. Yet, for purposes of his "judicial estoppel" argument, he refers to the defendants in the federal suit as "the State," based on the fact that the Attorney General's Office was counsel of record in both lawsuits. Pet. 9-10. For the sake of clarity in discussing the two cases, respondents refer to the federal defendants in this brief as "the State," without conceding the propriety of this designation.

thus had violated his First Amendment right to access to the courts.

The district court dismissed the complaint, pursuant to FRCP Rule 12(b)(6), for failure to state a claim upon which relief could be granted. The Court of Appeals for the Second Circuit affirmed. *Easton v. Sundram et al.*, 947 F.2d 1011 (2d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1943 (1992).

In seeking dismissal of the federal complaint, the State cited the same facts about Easton and BPRI as it relied upon in this case. Petitioner's contention that the State "asserted that Dr. Easton did not control BPRI," Pet. 10, is therefore inaccurate. In fact, the State maintained in the federal action that Easton, as founder, Medical Director, and ex-officio board member of BPRI, "exercised almost total dominion and control" over that facility and utilized that control to implement the fraud. Brief for Appellees to Second Circuit Court of Appeals, May 3, 1991 ("Appellees' Br."), at 3. Indeed, since the federal lawsuit was decided on the pleadings, the State's statement of facts was based almost entirely on the State court complaint and related documents, which were annexed to the federal complaint and deemed incorporated therein.[5]

The State argued to the federal courts, however, that Easton's excessive influence over the board of directors of BPRI did not give him constitutionally-protected rights based on BPRI's conduct or property, and that, accordingly, Easton had failed to state a claim under 42 U.S.C. § 1983. Thus, the State maintained that BPRI, not Easton, had brought the Article 78 proceeding on which Easton's First Amendment claim was based, and because they were not the same entity (and the State never claimed they were), Easton could not assert BPRI's First Amendment rights. Appellees' Br. at 41-43.[6]

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[5] Since the federal complaint was dismissed on the pleadings, the State was restricted to the material that Easton himself had attached to his complaint, including 1100 pages of exhibits from the State case.

[6] The State also pointed out, in opposing Easton's claim of deprivation of property, that Easton and BPRI were separate legal entities and, as the District Court found, Easton did not have a constitutionally-pro-

The Second Circuit Court of Appeals agreed. It affirmed the dismissal of the federal complaint and held that Easton:

> has failed to demonstrate that his conduct is deserving of first amendment protection. Although we accept his argument that the institution of an Article 78 lawsuit may constitute first amendment protected activity [cites omitted], it was *BPRI*, not *Easton*, that brought the Article 78 proceeding. Therefore, accepting as true Easton's allegations that defendants sought to retaliate because OMH was unsuccessful in the Article 78 proceeding, BPRI's first amendment rights were implicated, not Easton's. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

947 F.2d at 1015. Easton petitioned for certiorari, but did not raise the judicial estoppel claim, although he had argued it in his Reply Brief to the Second Circuit. The petition for a writ of certiorari was denied. 112 S.Ct. 1943.

REASONS FOR DENYING THE WRIT

A. This Court Lacks Jurisdiction Over The Constitutional Claims in the Petition Because They Were Not Raised in The Court Below

The petition for certiorari should be denied because it asks this Court to consider two constitutional claims that petitioner failed to raise in the court below. As a result, even if the questions presented were based on accurate descriptions of the records in the two courts, neither may be heard by this Court. 28 U.S.C. § 1257(a) grants this Court certiorari jurisdiction over a final state court judgment in which

> any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . .

Since the alleged due process claims asserted were not "specially set up or claimed" in the court below, petitioner failed to

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tected interest in BPRI's operating certificate. *See S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962 (2d Cir. 1988); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985).

meet this prerequisite for review by this Court. In order to satisfy section 1257(a), petitioner must have asserted each constitutional question expressly and with specificity in the state court, *Webb v. Webb*, 451 U.S. 493 (1981), and also must have identified the particular federal constitutional provision at issue. *Id.* 451 U.S. at 496; *Brady v. State of Maryland*, 373 U.S. 83, 91 (1963). It is not sufficient if, as here, some factual allegations were made below, but not framed in constitutional terms. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *see also Riggins v. Nevada*, ____ U.S. ____, 112 S.Ct. 1810, 1814 (1992). These limitations on certiorari jurisdiction under section 1257(a) insure that the state court has the first opportunity to address the federal question and that there is a sufficiently developed record to permit appropriate review of the state judgment. *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).[7]

In this case, petitioner did not satisfy either of these concerns. The State court below never addressed a federal constitutional argument because petitioner never raised one. Although he argued "judicial estoppel" in his brief in opposition to respondents' appeal to the Appellate Division, he never framed the issue in constitutional terms and never argued, as he does in his petition, that the alleged "judicial estoppel" rose to the level of a constitutional violation. *See* Defendants-Respondents' Brief in Opposition, Appellate Division, Second Department, March 30, 1992 ("Def. Br.") at 65-68.[8] Nor did petitioner ever mention a Fourteenth Amendment due process claim

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[7] The Court has not determined whether section 1257(a) is jurisdictional, but ordinarily adheres to the restrictions on review in any event in light of these prudential considerations. *See Bankers Life, supra*, 486 U.S. at 85-87; *Cardinale v. Louisiana, supra*, 394 at 439.

[8] In that brief, as here, Easton mischaracterized the State's arguments in the two courts. He erroneously claimed that the State had described Easton in the federal case as a "mere employee of BPRI," and had argued that the State's actions against BPRI "had nothing to do with Dr. Easton." *Id.* at 66-67. The record belies these assertions, and, accordingly, the judicial estoppel argument was implicitly rejected by the court below, as it was by the Second Circuit Court of Appeals.

based on lack of evidence of his role in the fraud, although he filed numerous briefs to the court below in which he disputed the significance of various aspects of the State's evidence.

Petitioner did make a general, passing reference to a due process "fairness problem" in his brief to the New York Court of Appeals in support of his motion for leave to appeal the judgment. Defendants-Appellants' Brief to Court of Appeals, October 16, 1992, at 12. Because that court denied leave to appeal, however, petitioner's claim cannot be reviewed by this Court. Raising the issue for the first time in the context of an unsuccessful effort to obtain discretionary review by a higher state court does not suffice to grant jurisdiction under 28 U.S.C. § 1257(a). *Yee v. City of Escondido, California*, ____ U.S. ____, 112 S.Ct. 1522 (1992); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958).

Petitioner's failure to raise the constitutional questions below is reflected in the fact that he did not comply with Rule 14.1(h) of this Court, which requires that a petitioner specify in detail the stage in the proceedings below at which the federal questions were raised and the manner in which they were raised and ruled upon. Petitioner has not complied with this Rule because he is unable to do so. Accordingly, the writ should be denied.

B. Even if Jurisdiction Exists, Petitioner Has Failed to Raise a Question Worthy of This Court's Review

Even if petitioner met the prerequisites of section 1257(a), he has failed to articulate a constitutional claim worthy of this Court's attention. First, the factual predicates for his claims are lacking. Contrary to petitioner's contention, no judicial estoppel arose here, since the State presented each court with the same facts about Easton's role at BPRI. Judicial estoppel only applies where a party's legal strategy reflects "cold manipulation," *Matter of Cassidy*, 892 F.2d 637, 642 (7th Cir.), *cert. denied*, 498 U.S. 812 (1990), based on "clearly" or "unequivocally" inconsistent positions, *id.* at 641; *Consolidated Edison Co. v. Herrington*, 752 F.Supp. 1082, 1087 (D.D.C. 1990), *aff'd* 927 F.2d 1227 (1991), that is, legal or factual positions

that are "mutually exclusive," *United States v. Lehman*, 756 F.2d 725, 728 (9th Cir.), *cert. denied*, 474 U.S. 994 (1985), or "diametrically opposed," *F.D.I.C. v. CNA Casualty of Puerto Rico*, 786 F.Supp. 1082, 1086 (D.Puerto Rico 1991). In this case, the State did not "manipulate" or "play fast and loose with the courts," *Scarano v. Central Railroad Company of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953), as petitioner claims. Instead, each court issued its judgment after being accurately apprised of the details of the other proceeding.

Moreover, even if petitioner's statement of the facts were correct and the State had failed to advise the federal court of Easton's controlling position in BPRI, no issue of judicial estoppel would arise because the decisions of the two courts are not "mutually exclusive." Thus, even if Easton had not controlled BPRI, he would be liable for the Medicaid fraud under State law because of his personal design and supervision of the system. Conversely, Easton's control of BPRI and manipulation of BPRI's Medicaid billing records did not enable him to assert that corporate entity's constitutional rights. *Cf., Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730 (11th Cir. 1984).[9]

Furthermore, assuming *arguendo* that the State did take inconsistent positions, petitioner would still fail to state a constitutional claim under the Due Process Clause. Judicial estoppel is a doctrine "intended to protect the courts rather than the litigants," *Cassidy*, 892 F.2d at 641-642. It does not grant a party any vested rights, and its application is within the sound discretion of the court based on the facts of each case. *Id.* at 642. For this reason, judicial estoppel ordinarily does not require prejudice or injury to the opponent. *Id.* at 641, n. 2. This is hardly the basis for a claim of constitutional dimension.

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[9] As noted, *supra* at 5, n.4, none of the plaintiffs in this case were parties in the federal case. Judicial estoppel prevents the same "party" from taking inconsistent positions and petitioner has not cited any case in which the doctrine was invoked based solely on the same counsel representing different parties.

Petitioner cites two decisions in which a judicial estoppel claim was considered in constitutional terms. *See Drake v. Kemp*, 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark J., concurring), *cert denied*, 478 U.S. 1020 (1986); *Nichols v. Collins*, 802 F.Supp. 66 (S.D.Tex. 1992). Both cases involved criminal prosecutions, however, in which the prosecutors took "mutually exclusive" positions concerning the alleged criminal conduct, thus casting doubt on the validity of both convictions. *Drake*, 762 F.2d at 1479. This prosecutorial misconduct raised questions of fundamental fairness under the Fourteenth Amendment's prohibition against deprivation of liberty without due process of law.

Here, in contrast, the proceedings were civil, and petitioner has not cited any authority for the proposition that governmental inconsistency in a civil proceeding raises similar constitutional concerns. Indeed, conduct that is constitutionally impermissible in a criminal trial does not necessarily implicate federal rights when it occurs in a civil context. *See, e.g., Easton v. Sundram, supra*; (declining to recognize a cause of action under section 1983 for malicious civil prosecution); *accord, Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1988); *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 522 (6th Cir. 1987); *Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983).

Nor has petitioner even attempted to articulate the theoretical basis for his constitutional claim or the reason it poses "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 10.1(c). Instead, he simply argues the law of judicial estoppel, as he did unsuccessfully below, and concludes that it implicates his constitutional rights.

Finally, petitioner's contention that there was no evidence to sustain the findings against him, Pet. 16-18, is also controverted by the record. The court below correctly found "overwhelming evidence" of the fraud and expressly rejected Easton's claim that the home visits recorded were not billed to Medicaid. A. 5a. The court also cited the numerous evidentiary

bases for holding Easton personally liable under SSL § 145-b. A. 4a, 6a.

This case accordingly raises no due process concern and provides no other grounds for the Court to deviate from its usual reluctance to grant certiorari solely to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
August 5, 1993

Respectfully submitted,

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APPENDIX

APPENDIX

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, SECOND DEPARTMENT, DATED JULY 6, 1992

91-06269, 91-10537, 92-04727

July 6, 1992

The PEOPLE of the State of New York, et al.,

Appellants,

—v.—

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, et al.,

Respondents.

Supreme Court, Appellate Division, Second Department.

LAWRENCE J. BRACKEN, J.P.
CHARLES B. LAWRENCE
DAVID S. RITTER
JOHN COPERTINO

MEMORANDUM BY THE COURT

In an action, *inter alia*, to enjoin the defendants from operating certain mental health facilities and to recoup public and residents' funds allegedly misappropriated by the defendants through Medicaid and real estate fraud, the plaintiffs appeal from (1) an order of the Supreme Court, Kings County (Ventiera, J.H.O.), dated May 6, 1991, which, after a nonjury trial, directed that the complaint be dismissed and severed the claims of the defendants 3 Lafayette Avenue Corporation and Cobble Hill Center Corporation to recover unpaid rent from a

court-appointed receiver, (2) an order of the same court, also dated May 6, 1991, which, *inter alia*, added the receiver as a party to the severed action, directed that interest be added to the rent to be paid by the receiver, and directed that a post-trial hearing be held on the issue of the market rental value of the facilities utilized by the receiver, and (3) a judgment of the same court, entered June 5, 1991, which dismissed the plaintiff's complaint in the original action.

ORDERED that the first order dated May 6, 1991, is modified by striking therefrom the provision directing a severance and the portion thereof which dismissed the complaint insofar as it is asserted against the defendant Karl Easton; as so modified, the first order dated May 6, 1991, is affirmed; and it is further,

ORDERED that the second order dated May 6, 1991, is modified, on the law, by deleting the third decretal paragraph thereof; as so modified, the second order dated May 6, 1991, is affirmed; and it is further,

ORDERED that the judgment is modified by (1) adding thereto a provision awarding judgment in favor of the plaintiffs and against the defendant Karl Easton in the principal sum of $7,573,703, representing the proceeds of Medicaid fraud and treble damages pursuant to Social Services Law § 145-b, (2) adding thereto a provision awarding judgment in favor of the defendants 3 Lafayette Avenue Corporation and Cobble Hill Center Corporation and against the receiver Federation Employment Guidance Service, in the principal sum of $38,708, and (3) adding to the first decretal paragraph thereof, after the phrase "hereby is dismissed" the words "in all other respects"; as so modified, the judgment is affirmed; and it is further,

ORDERED that the plaintiffs are awarded one bill of costs payable by the defendant Karl Easton.

The evidence established that Dr. Karl Easton controlled the Brooklyn Psychosocial Rehabilitation Institute (hereinafter BPRI), a not-for-profit corporation, which offered services to the mentally ill. The Easton family also controlled BPRI's landlords, Cobble Hill Center Corporation (hereinafter CHCC) and 3 Lafayette Avenue Corporation (hereinafter 3LAC), which

owned the premises leased to BPRI, housing its two facilities. These facilities included: (1) the Boerum Hill Community Residence (hereinafter BH), a supervised community residence for mentally disabled persons located at 50 Nevins Street, Brooklyn, which rented its premises from CHCC and housed 196 mentally disabled individuals, and (2) The Lafayette Center (hereinafter TLC), a continuing treatment outpatient program located some two blocks from BH at 3 Lafayette Avenue, Brooklyn, and which leased its property from 3LAC. Also affiliated with BPRI and rented from CHCC were the "Satellite Apartments", located at 415, 417, and 419 State Street, Brooklyn, where resided less mentally disabled persons who were capable of some degree of independent living but still required intermittent supervision. These facilities were licensed by the New York State Office of Mental Health (hereinafter OMH), and were funded by both Medicaid and Social Security. In their complaint, the plaintiffs charged, *inter alia*, that Easton defrauded Medicaid by improperly billing for "home visits" that were either not reimbursable or not performed. Indeed, they alleged that in 1985, for example, 95% of all "home visits" reimbursed by Medicaid State-wide were paid to BPRI.

The instant action was commenced by service of a summons and complaint on or about October 20, 1986. The trial consumed several days over a 10-month period. Following trial, J.H.O. Ventiera dismissed the complaint, while severing for a further hearing the claims for rent by the defendants 3LAC and CHCC against the court-appointed receiver, Federation Employment Guidance Service (hereinafter FEGS), for the period from October 20, 1986, to April 19, 1988, when the State took title by condemnation. On August 2, 1991, the rent hearing was stayed by this court pending determination of the instant appeal.

We find that the plaintiffs carried by overwhelming evidence their burden of proving that the defendants fraudulently billed Medicaid for "home visits" that were not actually performed, as the patient-staff interactions reported as BPRI "home visits" did not satisfy the Medicaid regulations and guidelines.

A "home visit" to a psychiatric patient by a qualified member of a clinical facility is contemplated by the OMH regulations and guidelines to be a rare event, to be provided in the patient's home environment when he is for some reason unable to attend the regular clinic or day treatment center. According to 14 NYCRR former 579.5(e) [effective Aug. 10, 1982, repealed Apr. 5, 1988]: "Services may be provided to patients at a location away from the [clinic] facility. Except for crisis services, the patient's treatment plan must include the location where off-site services will be provided and justify the need for such off-site services. Reimbursable off-site services shall be limited to assessment and treatment planning services, verbal therapies, medication therapy, crisis services, and case management services". A "home visit" is required to be at least 30 minutes in duration (14 NYCRR former 579.6[a][5]; [b][5]; [c][5] [effective Aug. 10, 1982, repealed Apr. 5, 1988]).

In late 1984 and early 1985, the defendant Dr. Easton initiated a new "home visit" policy at BPRI, according to which every casual contact between *any* BPRI employee and a client occurring off the clinic premises was to be recorded in a log as a "home visit". The plaintiffs proved that the enormous quantity of "home visits" billed to Medicaid by BPRI between January 1985 and October 1986 was directly traceable to this new "home visit" policy. Thus, the plaintiffs' witnesses testified that Easton insisted that all BPRI staff—including regular BH employees, whose *ordinary* job it was to wake up the residents, interact with them, motivate them, etc.—enter each of their routine and casual contacts with patients as "home visits". These "home visits", as recorded in BPRI's "home visit logs" after December 1984, failed to conform to Medicaid's definition of "home visits" for the following reasons: (1) they were done routinely rather than when patients were temporarily homebound, (2) they were performed in BH, a residence facility (i.e., a regular work location) rather than at the patient's home, (3) they were performed by regular BH floor staff rather than by qualified clinical therapists, (4) they were casual social contacts rather than contacts for the purpose of providing therapeutic services, (5) they were not therapeutically "justified",

(6) they were not documented, (7) their duration was not recorded, (8) they did not last (and could not be aggregated to) the requisite 30-minute minimum, and (9) each individual participating in a group activity was deemed to have had a "home visit", when a proper "home visit" was one-on-one.

The record does not support the defendants' contention that there was no relationship between those "home visits" recorded on the "home visit logs" and those billed to Medicaid. "Home visits" which were recorded on the "home visit logs" were then reported on the work sheet of the case manager responsible for that patient, as if the case manager had performed the visit himself. Also entered on the case manager's worksheet were all of the other services and attentions paid to that case manager's patients for that week. When the case manager's work sheet was sent to billing, the result was that *something* was billed to Medicaid for every patient for every day, although the facility could not bill *everything* entered on its in-house sheets without being in conspicuous violation of the Medicaid regulations. Thus, the evidence at trial established that if a patient was recorded as spending a full day ("F"), for example, at the clinic, *and* that patient was recorded as having received one or more "home visits" ("HVs") on the same day, the facility would bill Medicaid for an F rather than an HV.

Because there were, inevitably, more HVs entered on BPRI's home visit logs than were billed to Medicaid (since OMH regulations forbade more than one HV per day to the same patient), the defendants argued that they only *billed* "home visits" when the number of short contacts with a patient over the course of a day *added up* to a minimum of 30 minutes. Aside from the fact that—despite the Supreme Court's finding to the contrary—the regulations do not permit such an accumulation of home visit time, the plaintiffs' investigation showed that in some 72% of cases a "home visit" was traceable to *one* or *no* staff-to-client contact, while another 6% were undocumented.

The record thus reflects that between January 1985 and October 1986, through a scheme devised and implemented by Dr. Karl Easton, BPRI received $2,524,501 in public funds for

"home visits" that did not qualify for reimbursement under the OMH regulations.

Social Services Law § 145-b places personal liability on any individual who "knowingly by means of a false statement or representation, or by deliberate concealment of any material fact" falsely obtains—or attempts to obtain—public funds, "on behalf of himself or others". Where public welfare benefits are obtained fraudulently by an entity (e.g., BPRI), the individual supervising, overseeing, performing or conspiring to effectuate the fraudulent acts can be held personally responsible, and is liable for treble damages *(see, State of New York v. Britt*, 141 A.D.2d 911; *see also, United States v. Weiss*, 914 F.2d 1514, 1526, *cert denied sub nom Gleicher v. United States*, ____ U.S. ____, 111 S. Ct. 2888; *United States v. Brown*, 763 F.2d 984, 992, *cert denied* 474 U.S. 905; *Harvey-Cook v. Miroff*, 130 A.D.2d 621; *Harvey-Cook v. Steel*, 124 A.D.2d 709, 710). It is clear from the trial testimony that Easton designed, supervised, and implemented BPRI's "home visit" billing fraud on Medicaid.

Moreover, the plaintiffs proved that this fraud inured to the benefit of Easton and his family. BPRI's leases with Easton's realty corporations contained steep escalation clauses and so-called "net net" provisions, obligating the *tenant* to pay all taxes, expenses, repairs, etc. Such leases were *per se not negotiated at "arms length"*, as Department of Health (hereinafter DOH) expert David Hodgkins found, because Easton himself was controlling the bargaining on both sides of the bargaining table, in his not-for-profit capacity as Medical Director of BPRI, and his for-profit role as ultimate owner of CHCC and 3LAC (*see, Matter of Cantor v. Axelrod*, 63 N.Y.2d 965; *Matter of White Plains Nursing Home v. Axelrod*, 131 A.D.2d 24, 25). Through Easton's de facto control of the two realty corporations, which were ostensibly owned by his children, the family was personally enriched when the funds collected from the Medicaid fraud were paid in the form of grossly inflated rents.

In addition, because the leases were not negotiated at arms length, the court erred in determining that the so-called Medicaid "cap" did not apply to the rents during the receiver-

ship period. Mental Hygiene Law § 31.28(b)(4), which was patterned on the receivership statute of the DOH, Public Health Law § 2810(2)(b) (*see*, L.1984, ch. 863, Memorandum of Office of Mental Health) provides that if the leases to mental health community residences were negotiated at arms length, the rents contained therein would apply during a receivership period. If, on the other hand, they were not negotiated at arms length, the landlord is entitled to either the so-called Medicaid "cap" or the "fair monthly rental", whichever is lower (*see*, Mental Hygiene Law § 31.28[b][4]; Public Health Law § 2810[2][b]). Since the leases were *not* negotiated arms length, they should have been disregarded. Consequently, the Medicaid amounts ("the amount which *would* be reimbursable to the facility under the medical assistance program for real property costs *if* each patient in the facility were a recipient of medical assistance" [Mental Hygiene Law § 31.28(b)(4)], as computed and testified to by DOH expert Hodgkins (according to a formula derived from 10 NYCRR 86.2), should have been applied because they were lower than the stipulated "fair market rentals". By Hodgkins' computation, the Medicaid "cap" for both facilities together was $19,806 for 1986 and $18,902 for 1987.

We have considered the plaintiffs' remaining contentions and find that the further relief sought is not warranted on the record of these proceedings.